STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2008
v	No. 277650 Wayne Circuit Court
YASMEN JOBY TUCKER, Defendant-Appellant.	LC No. 06-013018-01

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

In this double jeopardy challenge, defendant Yasmen Tucker appeals as of right from March 2007 jury trial convictions of carrying a concealed weapon (CCW),[1] felon in possession of a firearm,[2] and possession of a firearm during the commission of a felony (felony-firearm).[3] The trial court sentenced her to two years' imprisonment for the felony-firearm conviction and two years' probation for the CCW and felon in possession of a firearm convictions. We affirm.

I. Basic Facts And Procedural History

Detroit Police Officer Leroy Huelsenbeck testified that in October 2006 he was following up on a tip concerning a possible shooting perpetrator in the city of Detroit. As he pulled up, Officer Huelsenbeck observed Tucker walking off of the house's porch toward the sidewalk. However, Tucker turned around and walked back to the porch as Officer Huelsenbeck exited the police car. As Tucker reached the porch, she faced Officer Huelsenbeck, who observed an outline of a handgun in Tucker's right-front pocket. Officer Huelsenbeck asked Tucker to come over but she instead fled into the house, so Officer Huelsenbeck's partner went to the front door as Officer Huelsenbeck went to the northeast window. Through this window, Officer Huelsenbeck witnessed Tucker bending over the living room couch in the apparent act of placing something under the couch. Tucker then went to the door, where she spoke with Officer

[1] MCL 750.227.

[2] MCL 750.224f.

[3] MCL 750.227b.

Huelsenbeck's partner while Officer Huelsenbeck entered the home, went over to and moved the couch, and recovered a handgun. A later investigation of this gun found it to be loaded with three live rounds. Tucker did not have a permit for the weapon. Officer Huelsenbeck's partner testified about the same events.

As stated, a jury convicted Tucker of CCW, felon in possession of a firearm, and felony-firearm. Preliminary examination evidence indicated that Tucker had a 2005 felony conviction for uttering and publishing.[4] Tucker now appeals the felony-firearm conviction.

II. Double Jeopardy Challenge

A. Standard Of Review

Tucker argues that the trial court lacked sufficient evidence to support her felony-firearm conviction because the underlying felony was felon in possession of a firearm. Although Tucker phrases her claim as a sufficiency of evidence argument, it substantively consists of a double jeopardy claim since Tucker's real claim concerns the application of the felony-firearm statute rather than the amount of evidence proffered as to each element. A double jeopardy challenge presents a de novo question of constitutional law.[5]

B. Felony-Firearm And Felon In Possession Of A Firearm

The United States and Michigan Constitutions both protect defendants by prohibiting placing a defendant in jeopardy multiple times for a single offense.[6] Despite this double jeopardy protection, cumulative punishment may be permitted when clearly intended by the legislature.[7] The felony-firearm statute is one example of legislative intent to provide for cumulative punishments. The felony-firearm statute clearly does not list the offense of felon in possession of a firearm as an exception from use as an underlying felony.[8] In addition, well-established caselaw has held that the offense of felon in possession of a firearm may constitute

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[4] MCL 750.249.

[5] *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

[6] US Const, Am V; Const 1963, art 1, § 15.

[7] *Ohio v Johnson*, 467 US 493, 499 n 8; 104 SCt 2536; 81 LEd2d 425 (1984) ("Even if the crimes are the same, . . . if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end."); *People v Calloway*, 469 Mich 448, 450-451, 457; 671 NW2d 733 (2003).

[8] MCL 750.227b ("A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years.") The exceptions include carrying a concealed weapon, MCL 750.227, unlawful possession of a pistol by a licensee, MCL 750.227a, unlawful sale of a firearm, MCL 750.223, and the willful alteration, removal, or obliteration of identity marks on firearms, MCL 750.230.

the underlying felony for felony-firearm.[9] However, the continued viability of those rulings became uncertain in the wake of the Michigan Supreme Court's decision in *People v Smith*.[10] *Smith* expressly overturned *People v Robideau*[11] and preceding decisions that used a double jeopardy analysis focusing on the type of harm the Legislature intended to prevent and whether the Legislature intended multiple punishments.[12] Those cases holding that a felon in possession conviction may constitute the underlying felony for felony-firearm employed a version of the double jeopardy analysis used in *Robideau*. Therefore, the question now is whether Tucker's conviction for felony-firearm will pass muster with the double jeopardy analysis set forth in *Smith*.

Under *Smith*, the first step when determining whether multiple punishments are barred on double jeopardy grounds is to determine whether the Legislature expressed a clear intention that multiple punishments be imposed.[13] In making this evaluation, this Court is careful not to backslide into the now-discredited *Robideau* reasoning and, therefore, will only accept clear and unambiguous indicia of legislative intent.[14] In this case, the Legislature very clearly intended multiple punishments when it enacted the felony-firearm statute. The felony-firearm statute provides for a mandatory two-year consecutive sentence for the first violation of that statute.[15] It also plainly limits the exempted underlying felonies to just four felonies, which are clearly listed.[16] Therefore, the Legislature very clearly intended to impose multiple punishments when it enacted the felony-firearm statute and very clearly did not intend to except felon in possession of a firearm as an underlying felony.[17]

Our conclusion renders it unnecessary to consider the second step of the analysis set forth in *Smith*, which is to apply the "same offense" or "same elements" test set forth in *Blockburger v United States*.[18] Taking into consideration the holding in *Smith*, we conclude that the prohibition

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[9] See, e.g., *Calloway*, *supra* at 451-452, 457; *People v Dillard*, 246 Mich App 163, 167-168; 631 NW2d 755 (2001).

[10] *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007).

[11] *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984), overruled by *Smith*, *supra* at 324.

[12] *Smith*, *supra* at 312-315.

[13] *Id.* at 316.

[14] See *People v Chambers*, 227 Mich App 1, 5; 742 NW2d 610 (2007).

[15] MCL 750.227b(1) and (2).

[16] See *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003), quoting *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002) ("If the language is clear and unambiguous, 'no further construction is necessary or allowed to expand what the Legislature clearly intended to cover.'").

[17] See *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 391; 280 NW2d 793 (1979) (stating that "the Legislature intended to make the carrying of a weapon during a felony a separate crime and intended that cumulative penalties should be imposed").

[18] *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); see *Smith*, *supra* at 316.

against double jeopardy was not violated by Tucker's conviction for felony-firearm predicated on the felon in possession of a firearm offense.

None of Tucker's remaining arguments have merit. "'[T]he Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws.'"[19] Therefore, the fact that the 1992 Legislature enacted the felon in possession of a firearm statute but did not see fit to simultaneously amend the felony-firearm statute supports the finding that the Legislature did not want to exempt felon in possession of a firearm from use as an underlying felony for the felony-firearm statute. Further, because legislative intent is clear in this case, there is no need to discuss or apply the principle of fair warning expressed in the rule of lenity.[20]

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[19] *Dillard, supra* at 168, quoting *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993).

[20] See *United States v Lanier*, 520 US 259, 266; 117 S Ct 1219; 137 L Ed 2d 432 (1997); *People v Peals*, 476 Mich 636, 655; 720 NW2d 196 (2006).